

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

TRI-VALLEY CARES, *et al.*,
Plaintiffs,
v.
UNITED STATES DEPARTMENT OF
ENERGY, *et al.*,
Defendants.

No. C 08-01372 SBA

ORDER

[Docket No. 47]

REQUEST BEFORE THE COURT

Before the Court is Plaintiffs' Motion for Leave to File Supplemental Brief (the "Motion") [Docket No. 47] and defendants' Memorandum in Opposition (the "Opposition") [Docket No. 54]. Plaintiffs seek leave of Court to file a supplemental brief in support of their Amended Motion for a Preliminary Injunction (the "Amended Motion") [Docket No. 13]. Specifically, plaintiffs seek to supplement with documents related to a draft environmental impact statement ("EIS") for a proposed United States Department of Homeland Security ("DHS") National Bio and Agro-Defense Facility (the "NBAF"). Mot. at 2. Plaintiffs claim these documents show defendants failed to consider all relevant factors or explain their decision, in issuing a Final Revised Environmental Assessment (the "FREA") for a proposed a biosafety level-3 facility, at the Lawrence Livermore National Laboratory ("LLNL"). *Id.* Defendants issued the FREA in response to a Ninth Circuit order to consider whether the threat of a terrorist act necessitated the preparation of an EIS for this facility, which defendants found it did not. *See id.*

Plaintiffs having filed an administrative motion, the Court disposes of the Motion without a hearing, under Civil Local Rule 7-11(c). As discussed below, the Court DENIES the Motion for two reasons. First, any differences between the EIS and the FREA are due to differences between the NBAF and LLNL's facility, do not raise any concerns not already considered by the Ninth Circuit and this Court, or are irrelevant. And second, because plaintiffs failed to make a reasonable effort to meet and confer prior to filing the Motion.

BACKGROUND

The facts of this matter are detailed, complex, and lengthy, but well-known to the parties, so the Court will not repeat them here. The Court will instead state the facts directly relevant to plaintiff's Motion. This is plaintiffs' second suit, under the National Environmental Policy Act of 1969 (the "NEPA"), 42 U.S.C. § 4321 *et seq.*, to prevent defendants from operating a biosafety level-3¹ ("BSL-3") laboratory at LLNL. In December 2002, the United States Department of Energy (the "DOE") issued an initial Environmental Assessment (the "EA") for the BSL-3 facility, concluding it would have no significant impact on the environment, and thus also issued a Finding of No Significant Impact ("FONSI"). *See* Docket No. 12, Ex. "1" at ii ("FREA").

On August 26, 2003, plaintiffs² sued defendants in this Court, under the NEPA, challenging the EA on numerous grounds, in *Tri-Valley Cares v. U.S. Department of Energy*, No. C 03-3926-SBA, 2004 WL 2043034, 2004 U.S. Dist. LEXIS 18777 (N.D. Cal. Sep 10, 2004). See Docket No. 1 in case 03-03926 SBA. On September 10, 2004, this Court granted summary judgment for the DOE and denied summary judgment for plaintiffs. *Tri-Valley Cares*, 2004 WL 2043034 at *1, 2004 U.S. Dist. LEXIS 18777 at *3-*4. On appeal, the Ninth Circuit noted the EA failed to consider the environmental impact of a terrorist attack. *Tri-Valley Cares v. Dep’t of Energy*, 203 Fed.Appx. 105, 107 (9th Cir. 2006). It thus affirmed in part and reversed in part, remanding for the DOE to consider whether the threat of a terrorist act required the preparation of an Environmental Impact Statement (“EIS”). *Id.* at 106-07.

On remand, from April 11 through May 11, 2007, the DOE circulated a draft Revised Environmental Assessment (the “REA”) for public comment which considered the impacts

¹ Guidelines issued by the Centers for Disease Control and Prevention (the “CDC”) and the National Institutes for Health (the “NIH”) divide lab operations into four levels, BSL-1 to BSL-4. BSL-3 laboratories work with agents which may cause diseases with serious or lethal consequences if untreated and which have the potential of aerosol (airborne) transmission. There are over 1,350 BSL-3 laboratories in the United States. FREJA at 8. Common examples are hospital surgical suites, laboratories associated with medical schools, or university research laboratories. *Id.* at 6.

² Not all the plaintiffs in the first suit are plaintiffs in the current suit, as those who were involved in a separate action related to the Los Alamos National Laboratory which has been resolved, have not joined the current suit. See Docket No. 177 in case 03-3926 at 2:18-3:5. Also, there is a new plaintiff in the current suit, Jedidjah De Vries. *Id.*

1 potentially associated with terrorist attacks. Docket No. 13, Ex. "4" at cover; FREA at ii, 8. On
 2 January 25, 2008, after evaluating public comment, the DOE found no significant environmental
 3 impact would result from a terrorist attack on the BSL-3 laboratory, and issued the FREA and a
 4 Finding of No Significant Impact (the "FONSI"). Docket No. 11 at 5:25; *see* FREA and Docket
 5 No. 12, Ex. "4." The BSL-3 began operations this same day.³ Docket No. 12, Ex. "5" ¶ 3.

6 On March 10, 2008, plaintiffs filed a Complaint alleging defendants had failed to prepare an
 7 adequate EA and FONSI, failed to prepare an EIS, failed to supplement their REA, and failed to
 8 publicly circulate the FONSI. *See* Docket No. 1. On March 26, 2008, they filed a motion for a
 9 preliminary injunction. See Docket No. 13. This motion is currently under submission. On June 5,
 10 2008, plaintiffs filed a Request for Judicial Notice [Docket No. 40], regarding a one-page May 9,
 11 2008 press release issued by defendant National Nuclear Security Administration. *See* Docket
 12 No. 40. On June 9, 2008, the Court denied this request as the release was irrelevant to this matter.
 13 *See* Docket No. 41. In denying this request, the Court noted it had taken the motion for the
 14 preliminary injunction under submission and did "not require any supplemental pleadings." *See id.*

15 Nonetheless, nine days later, plaintiffs filed a motion for leave to file supplemental brief.
 16 *See* Docket No. 42. Plaintiffs sought to supplement their request for a preliminary injunction on
 17 their third claim that defendants failed to supplement and circulate the FREA with information
 18 regarding March and April 2008 developments. *Id.* at 2:10-27. On July 28, 2008, the Court denied
 19 this motion on the grounds plaintiffs' third claim was that defendants failed to supplement and
 20 circulate the March 2007 REA, and thus, they could not argue defendants failed to supplement the
 21 REA with information regarding developments occurring after the January 2008 FREA was issued.
 22 *See* Docket No. 53 at 1.

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25 ³ By stipulation, the parties agreed to a voluntary limitation on operations at the BSL-3 facility
 26 for 60 days, pending this Court's ruling on the preliminary injunction. Docket No. 13 at 10 n.1.
 27 This limitation requires: (a) no aerosol testing; (b) no rodent infection experiments; (c) no
 28 production, generation, or knowing receipt of genetically modified biological material that would
 require management of the facility at the BSL-3 level; and (d) the total amount of agents in the
 facility for which BSL-3 containment is recommended in fourth edition of *Biosafety in
 Microbiological and Biomedical Laboratories*, published by the CDC and NIH, shall not exceed
 100 ml. *Id.*

The Court also denied this motion on the independent ground that plaintiffs had failed to make a reasonable effort to meet and confer as required by the Court’s Standing Order for Civil Trials. *See id.* at 10. Specifically, the evidence showed on June 16, 2008, plaintiffs’ counsel sent an e-mail to defendants’ counsel, asking if they would oppose this motion, who then received an automated response that defendants’ counsel would be out of his office from June 16 through 20, 2008. *Id.* On June 18, 2008, plaintiffs filed their motion, without meeting and conferring. *Id.*

Prior to the July 28, 2008 Order, plaintiffs filed on July 11, 2008 the Motion for Leave to File Supplemental Brief (the “Motion”) [Docket No. 47] which is currently before the Court. In the Motion, plaintiffs seek to supplement their motion for a preliminary injunction with documents related to a draft EIS prepared for the proposed NBAF. Mot. at 2. Plaintiffs claim these documents show defendants failed in the FREA to consider all relevant factors regarding the environmental risk posed by a potential terrorist attack on LLNL’s BSL-3. *Id.* Defendants argue the Court may not consider these documents because they were unavailable to defendants when they prepared the FREA. Opp’n at 1:9-12. Alternatively, defendants argue any differences in the NBAF EIS are due to differences between the NBAF and LLNL’s facility, do not raise any concerns not already considered by the Ninth Circuit and this Court, or are irrelevant. Opp’n.

LEGAL STANDARD

I. The Four Exceptions for Reviewing Extra-Record Evidence

19 It is an established rule that “the focal point for judicial review should be the
20 administrative record already in existence, not some new record made initially in the
21 reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106
22 (1973). Under limited circumstances, however, extra-record evidence can be
23 admitted and considered.

At the district court level, extra-record evidence is admissible if it fits into one of four “narrow” exceptions: (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when

1 plaintiffs make a showing of agency bad faith. *Southwest Ctr. for Biological*
 2 *Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (internal
 3 punctuation omitted).

4 *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S.D.A.*, 499 F.3d 1108,
 5 1117 (9th Cir. 2007).

6 **II. The Court's Meet-and-Confer Requirement**

7 Paragraph 5 of the Court's Standing Order for Civil Trials mandates all parties meet and
 8 confer before filing any motions.

9 **ANALYSIS**

10 For the following reasons, the Court DENIES plaintiffs' Motion.

11 **I. The Court may consider plaintiffs' post-decision evidence.**

12 Plaintiffs seek to supplement the administrative record with post-decision extra-record
 13 evidence. As a threshold matter, before the Court may determine whether this evidence falls within
 14 one of the four *extra-record* admissibility exceptions, it must first determine whether it is admissible
 15 as *post-decision* extra record evidence. “[P]ost-decision information . . . may not be advanced as a
 16 new rationalization either for sustaining or attacking an agency’s decision.” *Southwest Ctr. for*
 17 *Biological Diversity*, 100 F.3d at 1450. Post-decision information may be considered by a district
 18 court, however, where it is “helpful in understanding the problem faced by the Agency and the
 19 methodology it used to resolve it.” *Ass’n of Pac. Fisheries v. E.P.A.*, 615 F.2d 794, 811 (9th Cir.
 20 1980).

21 Here, the FREA was issued in January 2008, while the draft EIS for the NBAF was issued in
 22 June 2008. Opp’n at 3:12-14. Thus, plaintiffs may not attack defendants’ conclusions in the FREA
 23 on the grounds they failed to consider facts within the NBAF. Plaintiffs, however, merely seek to
 24 use the methodology employed by the DHS, in analyzing terrorist threats in the draft EIS, to show
 25 defendants failed to use a reasonable methodology to analyze terrorist threats in the FREA. Mot.,
 26 Ex. “29” at 2-3. Further, they seek to show defendants failed to use their own 2006 safety analysis
 27 publications, in preparing the 2008 FREA, even though the DHS used them for the NBAF EIS. *Id.*
 28 at 10. Thus, both as an aid for analyzing defendants’ methodology in the FREA, and because certain

1 facts in the NBAF documents preceded the FREAs release, plaintiffs extra-record evidence is not
 2 inadmissible despite its post-decision nature. Nonetheless, the Court must still determine whether it
 3 is admissible under any of the four extra-record admissibility exceptions.

4 **II. Plaintiffs' extra-record evidence is inadmissible as it is not necessary to determine
 5 whether defendants considered all relevant factors or explained its terrorism analysis in
 6 the FREA.**

7 Plaintiffs seek to admit documents related to the EIS for the NBAF only under the first extra-
 8 record admissibility exception. Mot. at 2-3. In support, plaintiffs present three reasons why these
 9 documents show defendants failed in the FREA to consider all relevant factors when preparing their
 10 analysis of the environmental impact of a possible terrorist attack on LLNL's BSL-3 facility. *See id.*
 11 For the following reasons, however, these reasons do not support plaintiffs' conclusion.

12 **A. The NBAF and LLNL's facility are extremely different in size, scope, operation,
 13 and environmental impact.**

14 Plaintiffs assert both the NBAF and LLNL's facility will perform work for the DHS, have
 15 BSL-3 laboratories with similar containment measures and security, work with similar quantities of
 16 similar biological agents, and thus pose similar environmental risks. Mot., Ex. "29" at 6:1-13.
 17 Therefore, plaintiffs argue, any methodology employed in the NBAF EIS for analyzing the
 18 environmental risk due to a potential terrorist attack should be found in the FREA. *Id.* at 6:14-7:2.

19 Defendants note the NBAF as proposed would consist of six buildings covering 500,000 to
 20 520,000 square feet and require 30-acres of open land. Opp'n at 4:3-5. In contrast, LLNL's facility
 21 consists of one 1,500-square-foot building on a quarter acre. *Id.* at 4:5-6. The NBAF would employ
 22 250-350 people, while LLNL's facility would employ 6 people. *Id.* at 4:6-8. The NBAF would
 23 house up to 200 to 300 large animals, such as cattle, swine, and sheep, while LLNL's facility would
 24 hold up to 100 small rodents. *Id.* at 4:8-10. The NBAF is predicted to generate 25 to 30 million
 25 gallons of wastewater annually, while LLNL's facility might generate 10,000 gallons. *Id.* at 4:12-
 26 14. Aesthetically, the NBAF would be similar in size to a 400-bed hospital or 1,600-student high
 27 school, while LLNL's facility sits on a former parking lot, and poses no visual issues relative to
 28 nearby

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2 structures. *Id.* at 4:16-18. Thus, these two facilities have radically different physical profiles and
 3 expected environmental impacts.

4 Defendants also note these facilities differ drastically from an operational standpoint.
 5 Approximately 11% or between 55,000 and 57,000 square feet of the NBAF will involve BSL-4
 6 research, while the remainder will involve BSL-3 research. *Id.* at 5:1-2. BSL-4 research involves
 7 pathogens for which no vaccine or curative therapy exists. *Id.* at 5:3-7. In contrast, BSL-3 research
 8 involves pathogens for which medical treatment exists. *Id.* LLNL's facility will only involve BSL-
 9 3 research. Mot., Ex. "29" at 2:16. In the United States, there are over 1,300 operational BSL-3
 10 laboratories, but only 15 BSL-4 facilities in operation, planned, or under construction. Opp'n
 11 at 5:8-10. Further, the NBAF is unique: It would be the only large animal or livestock BSL-4
 12 facility in the United States. *Id.* at 5:10-11. Also, as expected given their respective sizes, the
 13 NBAF is projected to hold approximately 10,000 liters or approximately 200 times the pathogenic
 14 material which might be held at LLNL's facility. *Id.* at 5:27-6:3. Thus, the NBAF and LLNL's
 15 facility have radically different operational profiles and expected environmental impacts.

16 In addition, defendants note the scope of work at both facilities is markedly different. The
 17 NBAF is proposed to enable basic and advanced research, diagnostic testing and validation,
 18 countermeasure development (i.e. vaccines and antiviral therapies), and diagnostic training for
 19 high-consequence livestock diseases with potentially devastating impacts to American agriculture
 20 and public health. *Id.* at 5:12-16. In pursuit of this mission, the NBAF will focus on zoonotic
 21 (capable of animal to human transmission) and foreign animal diseases, including African swine
 22 fever, classical swine fever, foot and mouth disease ("FMD"), Japanese encephalitis, Rift Valley
 23 fever, and the Hendra and Nipah viruses, none of which are expected to be cultured at the LLNL
 24 BSL-3. *Id.* at 5:16-20. One of the NBAF's principal missions is developing a vaccine for FMD, one
 25 of the most devastating viral animal diseases affecting cloven hooved animals. *Id.* at 5:20-22. The
 26 mission of the LLNL facility, in contrast, targets the reduction of the national threat from terrorism
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2 using biological weapons and enhancement of public health capabilities.⁴ *Id.* at 5:22-24. Thus, the
 3 NBAF and LLNL's facility have radically different missions and expected environmental impacts.

4 Based on the vast physical, operational, and natural differences between the NBAF and
 5 LLNL's facility, the Court finds plaintiffs are incorrect in logically concluding that any
 6 methodologies employed in the NBAF EIS must be reflected in the FREA. Thus, these differences
 7 do not show defendants failed to consider all reasonable alternatives in preparing the FREA.

8 **B. The release scenarios merely differ in degree.**

9 The EIS for the NBAF models the release from an operational accident by analyzing the
 10 release expected due to a small to medium size spill. Mot., Ex. "29" at 8:7-10. Plaintiffs allege this
 11 model is similar to a scenario used in the FREA which considers the release which would occur due
 12 to the accidentally improper use of a centrifuge. *Id.* at 8:10-14. To model the release due to an
 13 unintentional or intentional "external event," the EIS considers an airplane crash followed by a fire.
 14 *Id.* at 8:15-19. The EIS also considers a crash without a fire, and indicates the release would be
 15 similar to that expected for a large accidental spill. *Id.* at 9:5-9. In modeling these releases, the EIS
 16 considers scenarios with and without mitigating factors. *Id.* at 7:14-17. In the latter scenarios,
 17 structure and safety systems are assumed to fail. *Id.* at 9:9-10. Plaintiffs argue that because the
 18 FREA contains no scenario involving an airplane crash without a fire, nor any unmitigated
 19 scenarios, its terrorism analysis must be defective. *Id.* at 9:11-10:2.

20 Defendants note in the initial environmental assessment ("EA") for LLNL's facility, they
 21 concluded the forces generated by reasonably expected natural catastrophes such as earthquakes, or
 22 accidents such as spills or plane crashes, would not generate a release greater than that expected
 23 from the accidentally improper use of a centrifuge. Opp'n at 8-10. Defendants did not consider the
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25 ⁴ In a footnote, plaintiffs allege the smaller size of LLNL's facility, and its work with agents
 26 associated with "the bioweapons threat," in contrast to the NBAF's focus on "foreign animal
 27 diseases," makes the former a more attractive terrorist target. Mot., Ex. "29" at 6 n.3. Plaintiffs
 28 provide no explanation for this bare conclusion, which is pure speculation, and thus the Court is
 unable to analyze to it. In another footnote, plaintiffs note defendants prepared an EIS for a BSL-3
 facility at the Los Alamos National Laboratory in New Mexico. *Id.* at 7 n.4. Plaintiffs, however,
 provide no explanation as to how this allegation relates to their Motion.

1 worst possible earthquakes or accidents in their model, because of their very low frequency of
 2 occurrence. *See id.* Both the Court and the Ninth Circuit approved defendants' reasoning based on
 3 the size, scope, and nature of LLNL's facility. *See id.* Defendants also note, in the EIS for the
 4 NBAF, the releases due to unintentional and intentional acts are modeled on small, medium, and
 5 large accidental spills. *See id.* In other words, the releases caused by the forces generated by
 6 unintentional and intentional acts are analyzed as similar to the releases caused by various sized
 7 accidental spills. *See id.* Defendants thus conclude that plaintiffs' argument is essentially that
 8 defendants should have considered a large accidental spill or release in the FREAs, rather than a
 9 small to medium one. *See id.*

10 The Court agrees with defendants. That is, the Court finds the only basic methodological
 11 difference between the release scenarios in the EIS and the FREAs is that the former consider
 12 releases from relatively small, medium, and large spills, while the latter only consider releases from
 13 relatively small or medium spills. *See Mot., Ex. "29" at 8:7-14.* The Court agrees that given the
 14 different size, scope, and nature of the two facilities, this size difference in release scenarios is
 15 expected. Further, the Court notes were it to adopt plaintiffs' conclusion that the EIS is the only
 16 proper standard for analyzing releases whether due to unintentional or intentional incidents, then it
 17 would have to find the Court and the Ninth Circuit erroneously found adequate defendants' analysis
 18 in the EA of releases due to natural or accidental events. The Court, however, is not so inclined.
 19 Thus, the Court finds the differences between the release scenarios in the EIS for the NBAF and the
 20 FREAs do not suggest the latter must exactly mirror the former. Thus, these differences do not show
 21 defendants failed to consider all reasonable alternatives in preparing the FREAs.

22 **C. The 2006 publications are irrelevant for the FREAs terrorism analysis.**

23 Plaintiffs assert defendants should have used the following two DOE publications in
 24 preparing the FREAs analysis of the environmental impact of a potential terrorist attack: (1) *DOE*
25 Standard 3009-94, CN3, Preparation Guide for U.S. Department of Energy Nonreactor Nuclear
26 Facility Documented Safety Analyses, published in March 2006; and (2) *DOE Standard 3014-2006,*
27 Accident Analysis for Aircraft Crash into Hazardous Facilities, published May 2006. *Id.*
 28 Plaintiffs claim it is "significant" the DHS used them in preparing the EIS for the

1 NBAF, but defendants did not use them to prepare the FREA. *Id.* at 10:25-27.

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3 Defendants note the first publication is for *nuclear* facilities, which LLNL's BSL-3 is not.
 4 Opp'n at 11. And, they note the second publication is for *accidental* airplane crashes, which are not
 5 at issue for an analysis of *intentional* acts. *See id.* Defendants note they could have consulted this
 6 publication, but instead had DOE experts prepare an analysis using other publications discussing
 7 how to model intentional acts. *See id.* Nonetheless, they indicate that given the proposed NBAF is
 8 substantially larger, has a much greater volume of pathogens, and poses a greater environmental
 9 impact than LLNL's facility, it is understandable the DHS might have prepared their external-events
 10 analysis differently than defendants did. *See id.*

11 The Court agrees with defendants and finds their choice not to use these two publications in
 12 preparing the FREA does not suggest they failed to consider all reasonable alternatives in preparing
 13 it.

14 **D. Conclusion**

15 None of the reasons advance by plaintiffs suggest the documents related to the NBAF EIS
 16 indicate defendants failed to consider in the FREA all relevant factors when preparing their analysis
 17 of the environmental impact of a possible terrorist attack on LLNL's BSL-3 facility. Thus, this
 18 extra-record evidence is inadmissible, and plaintiffs may not supplement their motion for a
 19 preliminary injunction with it. The Court thus DENIES the Motion.

20 **III. Plaintiffs failed to meet and confer with defendants prior to filing the Motion.**

21 As a separate and independent basis for denying the Motion, the Court holds plaintiffs failed
 22 to meet and confer with defendants prior to filing the Motion. Paragraph 5 of the Court's Standing
 23 Order for Civil Trials mandates all parties meet and confer before filing any motions. Here,
 24 plaintiffs' counsel declares on July 10, 2008, he called defendants' counsel to ask if he would
 25 oppose the Motion. Docket No. 47, Decl. of Counsel ¶ 2. Defendants' counsel asked for a copy of
 26 the Motion, which plaintiffs' counsel then e-mailed to him. *Id.* The next day, defendants' counsel
 27 sent plaintiffs' counsel an e-mail stating his clients would oppose the Motion. *Id.* ¶ 3. Plaintiffs'
 28 counsel thus states, "As such, a stipulation could not be obtained." *Id.* Plaintiffs filed the Motion

1 that same day. *See* Docket No. 47.

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3 The Court notes the terms “meet and confer” mean a movant must make a good faith and
4 reasonable effort to actually engage in substantive discussions with all other parties before filing a
5 motion. This requirement is designed to save the parties time and money in adversarial proceedings,
6 and expedite the Court’s docket, thus saving government resources. Here, plaintiffs made no
7 attempt to actually meet and confer with defendants. An exchange of e-mails does not constitute a
8 full, frank, and productive discussion on the merits of a proposed pleading or alternative courses of
9 action. As a result, the Court DENIES the Motion.

10 **CONCLUSION**

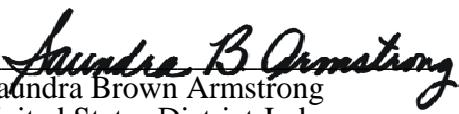
11 Accordingly, the Court DENIES Plaintiffs’ Motion for Leave to File Supplemental Brief
12 [Docket No. 47].

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14 IT IS SO ORDERED.

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September 5, 2008

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16 Saundra Brown Armstrong
United States District Judge

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